

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

BRUCE DUNN,

Appellant,

v.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

) Case No. DISM-01-0038

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Lower Columbia College, Administration Building, Longview, Washington, on April 3, 4, and 5, 2002 and at the Personnel Appeals Board in Olympia on April 8 and June 5 and 6, 2002. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Bruce Dunn was present and was represented by Mark Lyon, General Counsel for the Washington Public Employees Association. Mark Anderson, Assistant Attorney General, represented Respondent Department of Natural Resources.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, malfeasance and gross misconduct. Respondent alleges that Appellant engaged in inappropriate and unprofessional behavior while performing his duties as a Contract Administrator, and he intimidated and embarrassed a coworker during a staff meeting.

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2 **1.4 Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084  
3 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Parramore v  
4 Dep't of Social & Health Services, PAB No. D94-135 (1995); Rainwater v. School for the Deaf,  
5 PAB No. D89-004 (1989); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

## 7 **II. FINDINGS OF FACT**

8 2.1 Appellant Bruce Dunn was a Unit Forester 2 (Contract Administrator) and permanent  
9 employee for Respondent Department of Natural Resources. Appellant and Respondent are subject  
10 to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC.  
11 Appellant filed a timely appeal with the Personnel Appeals Board on May 8, 2001.

12  
13 2.2 Appellant began his employment with the Department of Natural Resources in 1978. As a  
14 Unit Forester 2/Contract Administrator, Appellant supervised three Unit Forester 1's, who were  
15 responsible for performing contract administration of timber sales. Appellant also carried a  
16 caseload of timber sale contracts. Appellant monitored all activities of the timber sale contracts to  
17 ensure compliance with contractual requirements and to ensure resource protection. Appellant  
18 completed and reviewed monthly timber sale inspection reports; he issued bills and monitored the  
19 status of payments; and he evaluated and recommended contract amendments for approval by the  
20 regional manager. Appellant was familiar with State and Federal forest practice laws and  
21 regulations and agency land management policies, guidelines and procedures.

22  
23 2.3 By letter dated April 24, 2001, Lands Stewart Bruce Mackey notified Appellant of his  
24 dismissal effective May 10, 2001. Mr. Mackey charged Appellant with the following misconduct:

- 25  
26 1. On September 19, 2000, in your capacity as the Moon Timber Sale contract  
administrator, without seeking modification of the contract, you approved road

1 construction on the road designated PH-3000 that you knew did not comply with  
2 contract specifications.

3 2. By your October 23, 2000 letter to Seneca Sawmill Company citing  
4 construction deficiencies, you attempted to conceal the fact that you had  
5 previously approved construction on the PH-3000 which did not comply with  
6 specifications in the Moon Timber Sale contract.

7 In the course of your performance as the Moon Timber Sale contract  
8 administrator,

9 3. . . . you failed to document, scale, and bill as additional volume trees that  
10 included those cut to widen the road right of way at road station designated  
11 20+00.

12 4. . . . on October 4, 2000, you failed to accept rock in the stockpile developed by  
13 the contractor without regard to the rock specifications in the contract.

14 5. . . . you failed to amend the Forest Practices Application on the Moon Timber  
15 Sale to include provision for a waste area at the road station designated 71+18.

16 6. . . . you acted in an intimidating and unprofessional manner.

17 7. You acted unprofessionally in your capacity as contractor administrator on  
18 timber sales purchased by Hampton Tree Farms, Inc., as reported by Hampton  
19 Tree Farms, Inc., in its January 31, 2001 letter of complaint.

20 8. You acted unprofessionally as supervisor of staff administering the Split Ends  
21 Timber Sale by requiring on February 15, 2001 that snags be cut that were not  
22 safety hazards and that were needed to be retained for wildlife habitat.

23 9. On February 1, 2001, you intimidated and embarrassed staff making a  
24 wellness presentation at a joint Yacolt and St. Helens District staff meeting.

25 2.4 Appellant has no history of formal or informal discipline and he was considered a highly  
26 qualified and experienced Contract Administrator. Appellant reported directly to Eric Wisch,  
District Manager.

1 **Allegations 1 through 6 - The Moon Timber Sale**

2 2.5 In June 1999, the state of Washington, through DNR, entered into the sale of state trust land  
3 (timber) with Seneca Sawmill Company, Inc. (Seneca Sawmill). The sale was referred to as the  
4 Moon Timber Sale. As the purchaser, Seneca Sawmill was required to meet the specifications of  
5 the contract unless an amendment to the contract was approved. The contract stated, “waivers,  
6 modifications or amendments of the terms of the contract must be put in writing and signed by the  
7 Purchaser and the State.”

8  
9 2.6 Wayne Madsen, Logging Manager for Seneca Sawmill, was acting as the company’s  
10 representative in the administration of the sale contract. As the purchaser, Seneca Sawmill was  
11 required to cut and remove all timber within a designated area in Cowlitz County by September 30,  
12 2001. Prior to harvesting the timber, however, Seneca was required to build a road leading to the  
13 site. The stretch of road that Seneca was required to build was designated as the “PH-3000 road.”  
14 The contract specifications required that the slope of the road not exceed 14 percent, with the  
15 exception of a 15 percent grade in one small section of the road.

16  
17 2.7 A portion of the PH-3000 road had to be built on land privately owned by Plum Creek, Inc.  
18 Prior to performing construction on private property, Seneca obtained a “Special Use Permit” from  
19 Plum Creek. Plum Creek granted permission for Seneca to build on their land along a section of the  
20 road referred to as station 71+18.

21  
22 2.8 Seneca Sawmill, through Mr. Madsen, subsequently contracted with Gould and Sons to  
23 construct the road. Mr. Madsen, who resided in the state of Oregon, authorized Bill Gould to act as  
24 the on-site representative on behalf of Seneca Sawmill and to work in cooperation with DNR. Mr.  
25 Gould then subcontracted with Mike Bannister to construct the roadway.

1 2.9 Bernie Jones, Contract Administrator for the Moon Timber Sale, wrote to Mr. Madsen on  
2 April 12, 2000 regarding a discrepancy between the road plan and the Forest Practices Application  
3 (FPA). The original road plan indicated there were two waste areas on the PH 3000 road: one at  
4 station 20+00 and one at station 71+18. The FPA, however, approved only the waste area at station  
5 20+00. Mr. Jones indicated that the FPA would govern the operation and that no waste area would  
6 be established at station 71+18. Station 71+18 was located on Plum Creek land and would require  
7 their approval for use to waste material there.

8  
9 2.10 Effective August 2000, the Moon Timber Sale contract was reassigned to Appellant. On  
10 August 2, 2000, Appellant met with Mr. Gould and Mr. Bannister to discuss two issues: the waste  
11 station and the road stakes. Mr. Bannister had concerns about the costs of having to waste material  
12 at station 20+00 because that waste site was approximately one mile away from the end haul area.  
13 After discussing options related to the waste station, they came to a consensus that in addition to  
14 wasting material at station 20+00, Mr. Bannister would use a waste area near the intersection of the  
15 PH3000/3600 roads (referred to as the Pushka waste site). The Pushka waste site was  
16 approximately a half-mile from the end haul area. Appellant and Mr. Bannister also believed that  
17 rock blasted during the road construction could be used as material for the road's surface, thereby  
18 reducing the amount of rock to be wasted. Mr. Bannister also indicated that he was unable to locate  
19 all the slope stakes in the end haul area. Due to engineering flaws in the original design of the road,  
20 the reference points and stakes laid out in 1999 contained erroneous information. In addition, some  
21 of the stakes had been dislocated in the winter of 1999. Appellant agreed to bring out an engineer  
22 to evaluate the slope stakes.

23  
24 2.11 On August 17, 2000, Appellant made a site visit with an engineer and reset several slope  
25 stakes that had been dislocated. Mr. Bannister subsequently commenced with building the road.  
26

1 2.12 On August 24, Appellant spoke to Mr. Bannister about the amount of rock that had been  
2 side cast onto Plum Creek's land during drilling of the road. Appellant told Mr. Bannister that the  
3 rock had to be removed off Plum Creek's property and end hauled to an authorized waste site. Mr.  
4 Bannister agreed and stated he would remove the material.

5  
6 2.13 On September 18, Appellant discovered that Mr. Bannister was continuing to waste material  
7 on Plum Creek property near station 71+18. Appellant reminded Mr. Bannister that station 71+18  
8 was not an authorized waste site and that he would need to obtain written permission from Plum  
9 Creek to leave the waste there. Mr. Bannister responded that he was seeking permission from Plum  
10 Creek, but that if permission was not granted, he would end haul the material to the Pushka waste  
11 site.

12  
13 2.14 On September 19, 2000, Appellant met with Mr. Bannister to look at the PH-3000 road. Mr.  
14 Bannister wanted Appellant to authorize "subgrade" of the road so he could complete the road  
15 project before the rainy season began. Subgrade approval is a key point during road construction  
16 which indicates that the contract administrator is satisfied that the condition of the road meets  
17 contract specifications. Subgrade approval also allows the contractor to surface the road with rock.  
18 Final haul approval takes place after the surface rock has been laid and the contract administrator  
19 confirms that the road meets all the necessary contract specifications and conditions necessary for  
20 trucks to haul timber on the road.

21  
22 2.15 The PH-3000 road, which was approximately one mile long, was visibly steep at the portion  
23 of the road located on Plum Creek owned property. The road grade at that section was  
24 approximately six to seven percent over the 14 percent elevation required by the contract. There is  
25 no dispute that the steepness of the PH-3000 road was far in excess of contract specifications.  
26 However, Appellant told Mr. Bannister that he would grant subgrade approval.

1  
2 2.16 Appellant maintained a written journal of actions and/or progress on the Moon Timber Sale.  
3 Appellant made an entry regarding his September 19 site visit, indicating that he granted subgrade  
4 approval on the PH-3000 from station 22+50 to station 79+77. These stations included the steep  
5 section of the road. Appellant also wrote a speed memo dated September 19 to Mr. Madsen and  
6 Mr. Bannister. In the speed memo, Appellant confirmed that he granted subgrade approval on the  
7 PH-3000 road from station 22+50 to station 79+77. The only stipulation noted by Appellant in the  
8 memo was the requirement that Mr. Bannister seed and fertilize the roadway area by no later than  
9 September 26, 2000.

10  
11 2.17 On September 21, Appellant visited the Moon Timber Sale site with his supervisor, District  
12 Manager Eric Wisch. They viewed the PH-3000 roadway from across a canyon and discussed the  
13 steep section of the road. Appellant acknowledged that the road was too steep. Appellant also told  
14 Mr. Wisch that he had talked to Mr. Bannister about the need to return to station 71+18 and cut a  
15 section of the road down to help improve the grade. Although Appellant testified that he told Mr.  
16 Wisch at that meeting that he had already granted subgrade approval on Mr. Bannister's word to  
17 bring the grade down, we find that Mr. Wisch's testimony that Appellant did not make him aware  
18 of the written unconditional approval is more credible.

19  
20 2.18 On September 22, Appellant made a log entry indicating that he left Mr. Bannister a  
21 message asking that Mr. Bannister seed and fertilize all of the PH-3000 roadway from station  
22 22+50 to 79+77 that week. Seeding and fertilization do not take place until a roadway is  
23 completely finished.

24  
25 2.19 In a log entry dated October 2, Appellant wrote that he reminded Mr. Bannister that he  
26 "expected [Mr. Bannister] to keep his word about cutting down the grade in the thru cut at [station]

1 71+00.” A Contract Administrator may exercise some independent judgment and give subgrade  
2 approval of a road when a minor detail or problem remains to be corrected. In this case, however,  
3 the steepness of the road required an inordinate amount of reconstruction and required written  
4 approval from Rick Cooper, Southwest Region Manager.

5  
6 2.20 On October 3, 2000, Appellant visited the road construction site to evaluate the rock that  
7 would be used to surface the road. The contract specification for the road construction indicated  
8 that the road was to be surfaced using “ballast.” Ballast is coarse gravel or crushed rock that is laid  
9 to form a bed for roads. After evaluating the rock, Appellant told Mr. Bannister that the rock was  
10 unsuitable for surfacing the road because there was too much dirt mixed in with the rock. Appellant  
11 was concerned that the excess dirt mixed with the rock created a potential for road erosion during  
12 heavy rain periods. Appellant and Mr. Bannister disagreed on the suitability of the rock and  
13 Appellant asked Road Maintenance Engineer Brett Freeman to visit the rock pit and evaluate the  
14 rock. After assessing the rock, Mr. Freeman concluded that it contained too much soil and was  
15 unsuitable for surfacing the road.

16  
17 2.21 Appellant told Mr. Bannister he could not use the rock as it existed to surface the road, and  
18 he suggested that Mr. Bannister take a “second shot” at the rock pit (blast) to obtain more rock.  
19 However, Mr. Bannister became upset and stated that shooting additional rock was too costly.  
20 Appellant and Mr. Bannister engaged in a heated discussion and could not come to an agreement.  
21 Appellant’s subsequent interactions with Mr. Bannister were strained and Appellant eventually  
22 refused to work with Mr. Bannister.

23  
24 2.22 In a speed memo dated October 4 to Mr. Madsen, Appellant confirmed the unsuitability of  
25 the rock and stated, “Further development of the good rock will be required to complete  
26 construction of the roads identified in the road plan.”



1  
2 2.23 Appellant went on vacation from October 5 through October 14, and Mr. Wisch took  
3 responsibility of the contract administration for the Moon Timber Sale during Appellant's absence.  
4

5 2.24 On October 5, Mr. Wisch went to the rock pit and met with Mr. Bannister, Mr. Madsen and  
6 Kevin Toney (with McCallum Rock Drilling) to evaluate and discuss the suitability of the rock.  
7 Mr. Wisch agreed that the excess presence of soil in the rock was a legitimate concern, and he  
8 denied use of the rock to surface the road.  
9

10 2.25 Mr. Wisch subsequently contacted Region Engineer Stanley Ross to discuss the excess of  
11 soil in the rock. Mr. Ross suggested that Mr. Bannister apply up to a double layer of the rock to  
12 make up for the excess soil.  
13

14 2.26 On October 6, Mr. Wisch gave a written conditional subgrade approval that allowed Mr.  
15 Bannister to use the rock on a limited section of the road by applying 108 cubic yards of the rock  
16 rather than the original 84 cubic yards required by the contract. Mr. Wisch wrote that applying the  
17 additional layer was necessary to "mitigate the effect of the presence of excess fines" in the rock.  
18

19 2.27 During the course of the road construction, trees were cut to widen the roadway and create  
20 the waste area that had been designated at station 20+00. After the trees were cut, they were decked  
21 so that Appellant could scale and bill them later. However, after Appellant observed where the logs  
22 were stacked, he felt they were too unstable for him to safely scale them, and he decided to wait  
23 until the logs were placed on the ground and were stable. However, while Appellant was on  
24 vacation, an employee of Mr. Bannister's hauled the unscaled logs to Seneca Sawmill. The logs  
25 were never scaled nor was Seneca billed for the logs.  
26

1 2.28 On October 9, 2000, Blaine Powell, Superintendent for Plum Creek, wrote to Southwest  
2 Region Manager Rick Cooper regarding concerns he had with the Moon Timber Sale that affected  
3 Plum Creek property. Mr. Powell specifically addressed the 21 percent road grade of the PH-3000  
4 road, complaining that the slope was too steep and did not conform with the required 14-percent  
5 grade required by the contract. Mr. Powell contended that the roadway, as it existed, was unusable.  
6 Mr. Powell also addressed the material that had been wasted on Plum Creek land at the spur road  
7 adjacent to station 71+18. Mr. Powell reiterated that Plum Creek previously denied the use of their  
8 property as a waste site. Mr. Powell also reminded Mr. Cooper that the "Special Use Permit" had  
9 no provision for a waste area on Plum Creek property.

10  
11 2.29 After reviewing the letter, Mr. Cooper forwarded a copy to Fred Hart, Forest Practices  
12 District Manager, and asked him to review the situation and respond. Mr. Cooper also forwarded a  
13 copy to Appellant.

14  
15 2.30 On October 18, 2000, Appellant wrote a letter to Mr. Madsen at Seneca Sawmill, outlining  
16 items that needed to be completed on the PH-3000 road before he would grant final haul approval.  
17 Appellant outlined seven separate unfinished items, however, he did not address that there was a  
18 problem with the slope of the road.

19  
20 2.31 On October 23, 2000, Appellant wrote a second letter to Mr. Madsen indicating that there  
21 was a significant amount of roadwork to be done on the Moon Timber Sale before he would grant  
22 final haul approval. Appellant also wrote that he "reluctantly gave subgrade approval to your  
23 operator, Mike Bannister, on September 19, 2000, prior to completion of the subgrade in the area of  
24 the thru-cut, in order that he could get some rock down on the PH-3000 reconstruction between  
25 ~Sta 73+50 to Sta. 79+77." This section does not include the steep section of the road. The letter

1 also does not reflect that the written subgrade authorization dated September 19 had only minor  
2 conditions attached to it.

3  
4 2.32 On October 26, Mr. Madsen wrote Mr. Cooper, indicating that Seneca Sawmill was  
5 "perfectly satisfied with Road PH3000 in its present condition." Mr. Madsen was requesting that  
6 the department amend the road plans of the Moon Timber Sale Contract to reflect the current  
7 conditions of the PH-3000 road.

8  
9 2.33 During his review of the allegations made by Plum Creek, Mr. Hart spoke to Appellant on  
10 approximately three to four occasions about the grade of the road. Appellant indicated that he gave  
11 subgrade approval on the PH-3000 road with an agreement from Mr. Bannister that the road grade  
12 would be taken down to meet the contract specifications. Appellant asserted that Mr. Bannister had  
13 not taken down the road grade as he agreed to do. Appellant told Mr. Hart that he normally did not  
14 give subgrade approval on a road that still required work. Appellant also told Mr. Hart that it "was  
15 the wrong thing to do," but that he did so on Mr. Bannister's word that the grade would be brought  
16 down. Mr. Hart also spoke to Appellant about Mr. Madsen's request for a contract amendment.  
17 Appellant insisted that Seneca Sawmill should be required to build the road according to the  
18 specifications of the original contract.

19  
20 2.34 Subsequently, Mr. Hart met with Mr. Gould and Mr. Bannister. Mr. Bannister denied that  
21 he entered into an agreement with Appellant to bring down the grade of the road and he further  
22 stated that he would not have agreed to that condition because of the additional costs he would have  
23 incurred to bring the road's grade down, which would have included destroying the culverts. Mr.  
24 Gould insisted that the road was built as required by Appellant and that he had no responsibility to  
25 perform any reconstruction on the road. During Appellant's interactions with Mr. Gould regarding  
26

1 the road grade issue, Appellant became angry and demanding and acted in an unprofessional  
2 manner.

3  
4 2.35 On October 27, Mr. Powell wrote a letter addressed to Mr. Cooper, Mr. Madsen and Mr.  
5 Gould indicating, in part, that he would 1) accept material that had fallen over an embankment  
6 between station 67+00 and station 70+00; 2) that he would accept the cut of the road as it existed if  
7 either DNR or the purchaser would cap the road from station 61+98 to station 71+28 with three  
8 loads of crushed yard; 3) that he would allow the existing stockpile located at station 71+18 to  
9 remain; and 4) that he wanted either DNR or the purchaser to seek Forest Practice approval for both  
10 the material over the embankment and the stockpile because neither condition was approved in the  
11 existing FPA to waste material on Plum Creek's property.

12  
13 2.36 Appellant was against approving an amendment to the contract road specifications and he  
14 believed that Seneca Sawmill and its contractors (Mr. Gould and Mr. Bannister) should be held to  
15 build the road to specification. Appellant continued to insist that he and Mr. Bannister had a  
16 "gentlemen's agreement" and Appellant threatened to withhold final haul if the road was not  
17 brought to grade. In a November 21, 2000 Timber Sale Inspection report for the Moon Timber  
18 Sale, Appellant indicated that Seneca Sawmill, as the purchaser, was required to obtain an  
19 amendment to the original FPA.

20  
21 2.37 On November 29, Mr. Madsen wrote a follow-up letter to his October 26 letter to clarify his  
22 amendment request. Mr. Madsen wrote:

23  
24 The focus of my amendment, which now appears to be the remaining issue, is  
25 Road PH3000 as it passes through the Plum Creek property and the connecting  
26 reconstruction segment or more specifically, between stations 61+98 and 79+77.  
This segment of road PH3000, in the design that was built, is what Seneca  
requests be amended into the road plans. The specific Plan Specification changes

1 would be those that represent the present grade of the road, alignment, and  
2 subgrade width.

3 Seneca is aware of Plum Creek Timber Company's concerns and desires with the  
4 portion of this road that crosses them. As a condition to granting our request,  
5 Seneca will satisfy Plum Creek's requests per Blain Powell's letter to you dated  
6 October 27, 2000, regarding the payment compensation, spreading of 30 cubic  
7 yard of 5/8<sup>th</sup>-rock, and obtaining Forest Practices approval.

8 2.38 After being informed of Mr. Powell's October 27 letter, Appellant continued to assert that  
9 Seneca Sawmill should be required to adhere to the conditions of the original contract. In a memo  
10 dated December 5, Appellant reiterated his position that Mr. Cooper should deny Mr. Madsen's  
11 request for a contract amendment.

12 2.39 On December 14, 2000, Appellant met with Mr. Wisch, Mr. Hart and Mr. Cooper at the  
13 Moon Timber site to view the steep section of the PH-3000 road. Mr. Cooper was viewing the site  
14 to determine whether to approve Mr. Madsen's request for a contract amendment. At that time,  
15 neither Mr. Wisch nor Mr. Cooper were aware that Appellant had given written subgrade approval  
16 of the entire PH-3000 road. Mr. Hart was concerned with Appellant's failure to come forward with  
17 that information and so he prompted Appellant to speak about the issue. That was the first time Mr.  
18 Cooper became aware that Appellant had granted subgrade approval of the PH-3000 road. At that  
19 point, Mr. Cooper felt that the department was responsible for having accepted the condition of the  
20 road in its present condition.

21 2.40 Mr. Cooper ultimately approved an amendment to the Moon Timber Sale contract in part  
22 because the original engineering of the road was flawed and because he felt that Appellant had  
23 failed to act appropriately in his role as the Contract Administrator when he granted an  
24 unconditional subgrade approval on the road which did not meet contract specifications. Mr.  
25 Cooper however, was not willing to give approval for the road to remain with the 20-21 percent  
26

1 grade. As a result, the department divided the cost with the road contractor for lowering the grade  
2 of the PH-3000 road from 21 to 16 percent.

#### 3 4 **Allegation #7 - Hampton Tree Farms**

5 2.41 Mr. Hart received a letter dated January 31, 2001, from Jerry Sparks, a forester for Hampton  
6 Tree Farms, Inc. Mr. Sparks wrote about concerns he had regarding the job performance of  
7 Appellant and he asserted that working with Appellant had "been a struggle" on virtually all of the  
8 timber sales. Mr. Sparks specifically alleged that Appellant "routinely demands performance  
9 outside of contract requirements. These demands may be in the method, manner, sequence for  
10 timing of work. A demand may also be for work additional to contract requirements."

11  
12 2.42 Respondent did not provide testimony from Mr. Sparks regarding his concerns. However, in  
13 a subsequent investigation performed by Joe Shramek, Assistant Manager, Mr. Sparks admitted he,  
14 not Appellant, lost his temper during a sale which dated back to 1996.

#### 15 16 **Allegation #8 - Split Ends Timber Sale and cutting of snags**

17 2.43 Scott Hanna, Forester 1, was the Contract Administrator for the Split Ends Timber Sale.  
18 Appellant was Mr. Hanna's direct supervisor. Part of the timber sale required that the sale area be  
19 replanted after the harvesting of the timber.

20  
21 2.44 DNR entered into a Habitat Conservation Plan (HCP) with the U.S. Fish and Wildlife  
22 Services and the National Marine Fisheries Service that addresses state trust land management  
23 issues related to compliance with the Federal Endangered Species Act. As a result, all sales  
24 contracts of state-owned lands are subject to the Habitat Conservation Plan. A snag is a dead or  
25 partially dead tree, also referred to as a danger tree. Snags provide habitat for wildlife and  
26 endangered species, and as a result, non-hazardous snags are retained. Some trees, including snags,

1 are considered dangerous trees if their height presents a hazard to workers because of rot or due to  
2 root, stem or limb damage.

3  
4 2.45 Tammy Riepe was the Regional Biologist involved in the Split Ends Timber Sale. Ms.  
5 Riepe authored documents which outline the plans for preservation of snags. Ms. Riepe's plan  
6 called for reserving tree clumps around significantly old dead trees known as type 4 reserve (snags  
7 and/or danger trees). She also indicated that snags in the harvest sale area would not be retained.  
8 In her memo dated November 12, 1999, Ms. Riepe wrote, "these snags should be retained where  
9 safe and practicable and will conform to the safety standards of the Department of Labor and  
10 Industries."

11  
12 2.46 The Department of Labor and Industries has established safety requirements regarding  
13 snags, and although no height has been established, DNR staff followed an unwritten rule that all  
14 dangers trees taller than 15 feet must be removed from a working area where work is being  
15 performed.

16  
17 2.47 In November 2000, Mr. Hanna was experiencing difficulties with the purchaser of this  
18 timber sale, Rayonier Incorporated. Specifically, Mr. Hanna believed that the purchaser was not  
19 complying with the L&I safety regulations regarding work being performed around danger trees.  
20 On November 15, Mr. Hanna reminded Erick Krume, the contractor logging the Split Ends Timber  
21 Sale, about the L&I regulations regarding working around snags. On November 30, Mr. Hanna met  
22 with an onsite representative for the logging operation to discuss the safety hazards of working  
23 around snags. DNR had plans to plant additional trees in the area, however, the planting could not  
24 be done if danger trees were present.

1 2.48 On December 6, Mr. Hanna reminded the loading operator that the danger trees had to be  
2 cut. On December 14, Mr. Hanna had another discussion with Mr. Krume who stated the tree  
3 fellers would return to the area and remove all snags over 20 feet tall. On December 27, Mr. Hanna  
4 met with the tree fellers to discuss the cutting of the danger trees and he discussed the unwritten  
5 rule about cutting snags greater than 15 feet in height. However, the tree fellers refused to remove  
6 snags less than 30 feet in height and they became argumentative with Mr. Hanna.

7  
8 2.49 On December 28, Mr. Hanna spoke to Mr. Krume and again discussed the snags. Mr.  
9 Krume indicated that he would remove some of the snags, but he insisted that OSHA rules gave the  
10 tree fellers discretion to determine what was a hazard tree.

11  
12 2.50 On January 3, 2001, Mr. Hanna spoke to Mr. Krume about his concerns that L&I safety  
13 regulations were not being complied with in respect to the danger trees. Mr. Hanna again advised  
14 Mr. Krume that he was to remove all snags over 15 feet from the sale area.

15  
16 2.51 On January 4, Mr. Hanna met with Appellant at the site. Appellant was concerned that the  
17 danger trees had not been removed and he told Mr. Hanna that failure to remove the snags presented  
18 both a danger to workers and presented a potential liability. Appellant directed Mr. Hanna to shut  
19 down the operation until all danger trees in the sale area over 15 feet were removed.

20  
21 2.52 Mr. Hanna subsequently informed Mr. Krume that all danger trees were to be removed. Mr.  
22 Krume agreed that he would direct the tree fellers to remove the hazard trees immediately.

23  
24 2.53 On January 8, Mr. Hanna conducted a site visit to the sale site where the snags were located.  
25 He noted the majority of the snag/danger trees had been removed. Mr. Hanna then met with Mr.



1 Krume, told him to have the remaining danger trees removed and warned him that failure to do so  
2 would result in a shut down of the operations.

3  
4 2.54 Subsequently, Mr. Krume, whose crew had logged about two-thirds of the acreage, directed  
5 his employees to “fell all the snags.” Some of the snags were located in areas that had already been  
6 logged, but where replanting would occur.

7  
8 2.55 Mr. Krume testified that Appellant directed him to cut all snags in “leave tree areas.”  
9 However, the evidence supports that Appellant’s direction to Mr. Hanna regarding the removal of  
10 hazard trees was in compliance with the sales contract, which required the purchaser to comply with  
11 all laws and regulations, including all safety standards for employees. Appellant’s directive was  
12 also consistent with Ms. Riepe’s recommendation that only snags that did not present a safety  
13 hazard could be retained.

14  
15 **Allegation #9 - Appellant's comments during the wellness presentation**

16 2.56 In February 2001, DNR employee Michelle Landuyt made a presentation about a wellness  
17 program. During her presentation, Appellant commented to the group that wellness was a personal  
18 issue “that meant different things to different people.” Mr. Wisch, Appellant’s supervisor, was  
19 present during the meeting and heard the comment. Mr. Wisch did not believe that Appellant acted  
20 inappropriately nor did he believe that Appellant spoke in an angry manner. Furthermore, other  
21 staff present at the meeting credibly testified before us that Appellant's statement and tone of voice  
22 were not unprofessional or out of line.

23  
24 2.57 Bruce Mackey, Lands Steward, was Appellant's appointing authority. Mr. Mackey  
25 reviewed the investigative reports from Mr. Hart and Mr. Shramek. He also met with Appellant and  
26

1 considered his history as a DNR employee. Mr. Mackey concluded that Appellant committed nine  
2 specific offenses:

3  
4 *Allegations 1 through 6*

5 2.58 Mr. Mackey testified that Appellant had an obligation under the Moon Timber Sale contract  
6 to 1) ensure that the work performed on the PH-3000 complied with all specifications and  
7 conditions of the contract or 2) advise his supervisor and ask for amendment to the contract. Mr.  
8 Mackey concluded that Appellant failed to undertake either option and instead gave subgrade  
9 approval for a road that did not comply with the contract. Mr. Mackey determined that Appellant  
10 represented to Seneca Sawmill that the road was satisfactory as constructed, an error Mr. Mackey  
11 believed would have gone without notice if Plum Creek had not filed a complaint. Mr. Mackey  
12 determined that Appellant was not forthcoming and that he later compounded the problem by not  
13 being truthful with his superiors when he attempted to conceal his actions.

14  
15 2.59 Mr. Mackey testified that Appellant created a potential liability for the department because  
16 the FPA had been violated. Mr. Mackey did not believe that Appellant had a verbal agreement with  
17 Mr. Bannister, but felt that even if it did exist, it was just as inappropriate as giving subgrade  
18 approval on the road.

19  
20 2.60 Mr. Mackey concluded that Appellant's actions constituted gross misconduct because he  
21 could no longer trust Appellant to conduct his duties with integrity. He felt that Appellant's failure  
22 to require contract compliance made the agency vulnerable to lawsuits and violated state and  
23 federal laws. Furthermore, Mr. Mackey was concerned because Appellant's actions resulted in the  
24 agency paying to correct problems with the road. Mr. Mackey testified that Appellant's misconduct  
25 also constituted malfeasance by misrepresenting that the contract had been complied with.

1 2.61 Mr. Mackey testified that Appellant neglected his duty when he failed to scale and bill  
2 extra-volume trees that were cut at his direction. Mr. Mackey concluded that the trees were  
3 positioned so that they could be scaled, but instead were hauled away because Appellant failed to  
4 fulfill his duties, which resulted in revenues not being collected by the department.

5  
6 2.62 Mr. Mackey concluded that Appellant neglected his duty when he failed to accept rock that  
7 complied with the contract and was suitable for surfacing the road. Mr. Mackey felt that the  
8 contract was open-ended with respect to the type of rock to be used to surface the road. Mr.  
9 Mackey concluded that Appellant's actions also constituted malfeasance because he misrepresented  
10 the contract and attempted to enforce a requirement not in the contract.

11  
12 2.63 Mr. Mackey testified that once Appellant became aware that the purchaser was placing  
13 waste at that site, Plum Creek was placed in a position where it was unwittingly violating the FPA.  
14 Mr. Mackey testified that Appellant was aware of the discrepancy between the Moon Timber Sale  
15 and the original FPA, which did not include a waste station at 20+00. Mr. Mackey testified that  
16 Appellant neglected his responsibility to ensure that Seneca Sawmill secured an amendment to the  
17 FPA.

18  
19 2.64 Mr. Mackey concluded that Appellant behaved in an intimidating and unprofessional  
20 manner while administering the Moon Timber Sale. Mr. Mackey found credible allegations that  
21 Appellant acted in an arbitrary, demanding, harassing and demeaning manner toward the purchaser  
22 and their representatives. Mr. Mackey concluded that Appellant's behavior was totally  
23 unacceptable, especially in his capacity as a supervisor. Mr. Mackey felt that Appellant's behavior  
24 damaged the trust necessary between a contract administrator and the department's clients.

1 2.65 *Allegation #7.* After reviewing the letter from Hampton Tree Farm, Mr. Mackey was  
2 concerned that Appellant was treating a major purchaser in a disrespectful manner, which he felt  
3 was harmful to the business relationship with a customer. Mr. Mackey testified that DNR functions  
4 like a business, and that customer relations are important. Mr. Mackey testified that as a result, all  
5 employees are required to treat the customers with respect and honesty. Mr. Mackey testified that  
6 Appellant neglected his duty to act in a professional and non-intimidating manner.

7  
8 2.66 *Allegation #8.* Mr. Mackey testified that Appellant acted arbitrarily and unprofessionally  
9 and put the agency at risk of violating the Habitat Conservation Plan when he directed his  
10 subordinate to have all snags cut in the Split Ends Timber sale area. Mr. Mackey testified that  
11 Appellant ignored his trust duties and violated the Habitat Conservation Plan and the FPA. Mr.  
12 Mackey testified that he considered this to be one of the two most significant and serious charges,  
13 and this charge alone supported his ultimate decision to terminate Appellant.

14  
15 2.67 *Allegation #9.* Mr. Mackey testified that Appellant's behavior toward Ms. Landuyt during  
16 her wellness presentation was insensitive, intimidating and disrespectful. Mr. Mackey testified that  
17 as a supervisor, Appellant was a mentor for others within the agency and that his behavior was  
18 inexcusable.

19  
20 2.68 Mr. Mackey concluded that Appellant's actions on allegations 1 and 8 alone warranted  
21 dismissal, but that when viewed in their totality, the allegations more than warranted the sanction of  
22 dismissal. Mr. Mackey felt that Appellant undermined the trust placed in him as a Contract  
23 Administrator and as a supervisor, that he failed to protect the interests of the agency and its  
24 trustees, and that he damaged the agency's credibility as a land steward. Despite Appellant's long  
25 history with the department, Mr. Mackey concluded that termination was the appropriate sanction.  
26

### III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the evidence supports that Appellant engaged in misconduct in each of the nine allegations. Respondent asserts that Appellant is not credible when he asserts that he had a “gentlemen’s agreement” with Mr. Bannister to bring the road grade down. Respondent argues that Appellant’s responsibilities as a Contract Administrator required that he act with professionalism and that he uphold the contract of sales of trust lands owned by the state of Washington and its citizens. Respondent argues that Appellant failed in his duty to be vigilant in his administration of the Moon Timber Sale contract, and that his misconduct had a negative impact not only on the Department of Natural Resource’s ability to conduct business, but on its reputation as a land steward.

Respondent asserts that Appellant’s actions also resulted in a negative financial impact on the state due to the costs incurred by the department in correcting the problems on the PH-3000 road and due to the revenues lost from not billing the extra volume trees. Respondent further argues that the department’s duty to preserve wildlife habitat was negatively impacted by Appellant’s directive that rare and valuable snags be cut, which resulted in an immeasurable loss to the state and to wildlife. Respondent asserts that either charge 1 or charge 8 alone would warrant termination of Appellant despite his long-term employment status and good employment record.

3.2 Appellant denies that he inappropriately managed the Moon Timber Sale contract and asserts that he gave Mr. Bannister subgrade approval on Mr. Bannister’s verbal promise that the slope of the PH-3000 road would be brought down. Appellant asserts that Mr. Bannister was not credible, that the evidence supports that the subgrade approval was conditional and that his only mistake was his failure to put the agreement in writing. Appellant further asserts that Mr.

1 Bannister had a financial motive to lie about the events. Appellant denies that he attempted to  
2 conceal his actions or that he acted in an unprofessional or intimidating manner.

3 Appellant asserts that the evidence supports that his decision to reject rock that contained  
4 excess soil was appropriate. Appellant asserts that it was not possible to work through all the  
5 potential options that might have existed, but that his decision to reject the rock was not arbitrary.

6 Appellant asserts that there was no issue regarding the Forest Practices Application until Mr.  
7 Bannister started feeling like he was losing money because he could not waste the rock at station  
8 71+18 and instead had to end haul it farther away. Appellant asserts that the FPA could not be  
9 amended before it was clear what was going to happen with the waste. Appellant asserts that there  
10 is no evidence to prove that he was not vigilant because he did not immediately get an amendment  
11 to the FPA. Appellant further asserts that in this case, the contractor was responsible for getting an  
12 amendment to the FPA.  
13

14 Regarding the complaint from Hampton Tree Farms, Appellant asserts that  
15 Respondent failed to provide any specificity regarding this charge and he further asserts that this  
16 allegation was used solely to buttress the charges related to the Moon Timber Sale.

17 Appellant asserts that he acted appropriately when he directed that snags be cut in the Split  
18 Ends Timber Sale because a DNR crew had to return to the area and replant around those danger  
19 trees.  
20

21 Appellant denies that he was unprofessional or intimidating during the meeting with Ms.  
22 Landuyt, and he asserts Respondent provided no testimony from the attendees to support the charge.

23 Appellant argues that Respondent has failed to meet its burden of proof and asks that his  
24 appeal be granted.  
25  
26

#### IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995).

4.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

4.6 Allegations #1 and #2. As the Contract Administrator for the Moon Timber Sale, Appellant had a duty to ensure that Seneca Sawmill complied with all terms of the contract. The road grade of

1 the PH-3000 did not comply with the requirements of the road plan and required a substantial  
2 amount of reconstruction to bring the slope down. Furthermore, Appellant did not have authority to  
3 modify the contract. Respondent has met its burden of proving that Appellant neglected his duty to  
4 ensure that the road construction plans were complied with by granting unconditional subgrade  
5 approval of the entire PH-3000 roadway. Under the facts and circumstances presented here, we  
6 conclude that any verbal agreement that Appellant may have made with Mr. Bannister was  
7 inappropriate and unacceptable and outside of his scope of authority. Furthermore, Appellant  
8 abused his power and authority as a Contract Administrator when he threatened to withhold final  
9 haul agreement on the road despite his written speed memo which conveyed that the work  
10 performed by the contractors was suitable and met contract specifications.  
11

12  
13 4.7 Appellant's October 23 letter to Mr. Madsen is not truthful or forthcoming when he states  
14 that he gave subgrade approval to Mr. Bannister so he could "get some rock down on the PH-3000  
15 reconstruction between ~Sta 73+50 to Sta. 79+77 . . ." In fact, Appellant had already granted Mr.  
16 Bannister unconditional subgrade approval to surface the entire PH-3000 roadway, not just a small  
17 section of the road. Respondent has met its burden of proving that Appellant attempted to conceal  
18 that he previously approved road construction on the PH-3000 which did not comply with  
19 specifications in the Moon Timber Sale.  
20

21  
22 4.8 Respondent has met its burden of proving that Appellant neglected his duty and that his  
23 misconduct rose to the level of gross misconduct regarding charges 1 and 2.  
24

25 4.9 Allegation #3. Respondent has proven that Appellant neglected his duty to document, scale  
26 and bill as additional volume trees that were cut to widen the road right of way at road station



1 designated 20+00. As the Contract Administrator, Appellant was responsible for scaling and billing  
2 the trees, or if he was unable to do so prior to leaving for vacation, for informing Mr. Wisch that the  
3 trees needed to be documented, scaled and billed. Respondent has proven that Appellant neglected  
4 his duty and that his misconduct rises to the level of gross misconduct.

5  
6 4.10 Allegation #4. As a Contract Administrator, Appellant had the authority and discretion to  
7 determine whether the rock was suitable to surface the road and to approve or reject its use for that  
8 purpose. Appellant reasonably concluded that the rock was not suitable and his conclusion is  
9 supported by the testimony of Mr. Freeman and Mr. Wisch who also assessed the rock and found it  
10 contained too much soil. Respondent has failed to prove that Appellant neglected his duty or acted  
11 inappropriately when he failed to accept rock developed by Mr. Bannister, which in his judgment  
12 was not suitable to surface the road.  
13

14  
15 4.11 Allegation #5. The original FPA for the Moon Timber Sale failed to include the waste area  
16 at station 71+18. Initially, Plum Creek refused to allow any wasting on their property and Seneca  
17 Sawmill had the option of hauling the waste to either the Pushka waste site or to station 21+00.  
18 However, Plum Creek eventually consented to allow Seneca Sawmill to waste existing rocks on  
19 their land and in his November 29, 2000 letter, Mr. Madsen agreed to obtain the Forest Practices  
20 approval for this to occur. As a result, there was a need for an amendment to the FPA . However,  
21 the FPA was never amended. As the Contract Administrator, Appellant had primary responsibility  
22 for following-up with Seneca Sawmill about applying for an amendment to the FPA. Respondent  
23 has proven that Appellant neglected his duty as the Contract Administrator to ensure that the  
24 amendment was made to the FPA and that his actions constitute gross misconduct.  
25  
26

1 4.12 Allegation #6. The evidence supports that there was a great deal of confusion and conflict  
2 surrounding the issues of subgrade approval, the surfacing rock, and the amendment to the FPA. It  
3 is also clear that Appellant, Mr. Bannister and Mr. Gould were engaged in a heated dispute as to  
4 whether the contractors were required to comply with the road construction specification in the  
5 Moon Timber Sales contract and whether the surface rock contained too much soil. Although  
6 Appellant denies that he engaged in an intimidating or unprofessional manner, we conclude that  
7 Appellant more likely than not, behaved unprofessionally during some of his interactions with Mr.  
8 Bannister and Mr. Gould. Respondent has met its burden of proving that Appellant neglected his  
9 duty to conduct himself in a professional and respectful manner.  
10  
11

12 4.13 Allegation #7. Respondent has failed to present credible evidence to establish the charge  
13 that Appellant acted unprofessionally as the contract administrator for timber sales purchased by  
14 Hampton Tree Farms. These sales by all estimates, occurred approximately five years prior to  
15 Hampton's January 31, 2001 letter of complaint. Furthermore, Respondent presented no evidence  
16 beyond the letter of complaint to establish that Appellant routinely required Hampton to perform  
17 work outside of contract specifications.  
18  
19

20 4.14 Allegation #8. Respondent has failed to meet its burden of proving that Appellant  
21 inappropriately directed his subordinate, Scott Hannah, to direct Mr. Krume to cut all snag trees in  
22 areas where felling and replanting would occur. Appellant provided persuasive testimony that his  
23 primary concern was for the safety of other employees and the need to ensure that L&I safety  
24 standards were met. Under these circumstances, Appellant's advice to Mr. Hannah was reasonable  
25 and within his scope of authority as a supervisor.  
26

1 4.15 Allegation #9. Respondent has failed to meet its burden of proving that Appellant's actions  
2 and statements during the February 1, 2001 meeting were intimidating or caused Ms. Landuyt  
3 embarrassment.  
4

5  
6 4.16 In determining whether a sanction imposed is appropriate, consideration must be given to  
7 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
8 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
9 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
10 program. An action does not necessarily fail if one cause is not sustained unless the entire action  
11 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).  
12

13  
14 4.17 Under the proven facts and circumstances presented here, we conclude that Appellant's  
15 dismissal is too severe a discipline. Two factors mitigate the discipline of dismissal: (1)  
16 Respondent failed to meet its burden of proof on a significant number of the charges and (2)  
17 Appellant has no prior history of discipline in his 22-year career with the Department of Natural  
18 Resources, and he should be given an opportunity to correct his behavior.  
19

20 4.18 In Frederick v. Secretary of State, DISM-98-0064 (1999), aff'd, Thurston Co. Super. Ct. No.  
21 99-2-01888-2 (2000), the Board recognized the difficulty an appointing authority faces whenever  
22 imposing disciplinary action against an employee. The appointing authority must impose a sanction  
23 which has the desired effect, for example, modifying or stopping the inappropriate behavior,  
24 without imposing a sanction which is too severe. The appointing authority may impose informal  
25 corrective action or impose formal discipline for just cause, including reducing the employee's  
26 salary, demoting, suspending or dismissing the employee.

1  
2 4.19 As in Frederick, the appointing authority here testified that he did not believe that any form  
3 of disciplinary action other than dismissal would have the desired effect of stopping Appellant's  
4 behavior. We continue to hold that our role is not to second guess whether the appointing authority  
5 imposed the correct sanction, but to determine, based on the facts, evidence and testimony  
6 presented to us, whether the charges were proven, and if so, whether the sanction imposed was  
7 appropriate under the circumstances.

8  
9 4.20 The merit system rules provide a maximum 15-day suspension or permanent demotion as  
10 the only forms of discipline short of dismissal; however, this Board is not limited to such  
11 constraints. Therefore, we conclude that a lengthy suspension is sufficient to prevent recurrence, to  
12 deter others from similar misconduct and to maintain the integrity of Respondent's program. We  
13 also feel that a long-term suspension is a strong warning to Appellant that, as a Contract  
14 Administrator, he is entrusted with a high-level of authority and that his primary duty is to protect  
15 the interests of the citizens of the state of Washington by enforcing all terms and conditions of trust  
16 land sale contracts. Therefore, the disciplinary sanction should be modified to a suspension,  
17 effective May 11, 2001 to the date of this order.  
18

19  
20 **V. ORDER**

21 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Bruce Dunn is granted in part  
22 and Appellant is suspended effective May 11, 2001 to the date of this order.

23 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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25 WASHINGTON STATE PERSONNEL APPEALS BOARD  
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